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No. 92-479

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE,
Respondents

On Writ of Certiorari to the
Supreme Court of West Virginia

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S. AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S. AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF CONSENT AND INTEREST OF THE AMICUS CURIAE

This brief is filed with the consent of the parties.

The Consumers Union of United States is a non-profit membership organization founded in 1936. It engages in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union

is committed to preserving the role of punitive damages and ensuring a responsive and consumer-oriented tort system. Without such a system, Consumers Union members will be denied a legal remedy that serves to increase efficiency, deter the production of unsafe products, and provide incentives to improve insurance and other professional services.

Consumer Federation of America is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 30 million people in matters pertaining to the well-being of the American consumer.

SUMMARY OF ARGUMENT

In a complex slander of title law suit, the petitioner was found to have participated in a fraudulent scheme, and a punitive damage award of $10 million was imposed. *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). The jury made its judgment after receiving competent and informed instructions on the law and purposes of punitive damages. The trial court judge reviewed the jury decision and thereafter the state Supreme Court of Appeals affirmed the case. The processes used at trial, on review and on appeal, comported fully with the requirements of due process.

The complaints that the process at trial was insufficient or the review inadequate are baseless. The claim that the petitioner was entitled to greater certainty is nothing more than a wish on the part of those who might have to pay punitive damages; neither the law nor the policy in West Virginia or at a federal level requires greater certainty or additional procedures than that which was received by the petitioner.

The verdict in this case was rational, connected meaningfully to the potential profit the petitioner sought to steal. The policies underlying the verdict, expressed in the law of the state of West Virginia, protect consumers from deceitful misconduct such as that which was engaged in by the petitioner. This Court has suggested that it might undertake a review of the constitutionality of a judgment or of a scheme whereby punitive damages are imposed. Nevertheless, a willingness to review does not mean that any party against whom a judgment has been entered can suddenly convert the United States Supreme Court into a forum to review the facts or to second-guess the decision of a properly instructed jury.

The Court must reject the arguments of the petitioner and affirm the decision of the West Virginia Supreme Court of Appeals.

ARGUMENT

I

THE TORT SYSTEM IN WEST VIRGINIA PROTECTS THE INTERESTS OF CONSUMERS. THE PRESENCE OF UNCERTAINTY, THE ABSENCE OF FIXED RATIOS, AND THE USE OF WEALTH DATA DESCRIBING A DEFENDANT DO NOT CREATE AN UNFAIRNESS REQUIRING INTERVENTION BY THIS COURT.

A. The Presence of Uncertainty Furthers Legitimate State Interests

At the heart of petitioner's complaint in this case is the challenge to the $10 million punitive damage award. The petitioner contends the jury was unguided and that TXO was exposed to grave risk due to the lack of certain-

ty or fixed ratios that exist for punitive damages. This concern, while understandable from the standpoint of a profit maximizing actor, does not justify overturning the verdict, directing a new trial, or changing the rules for tort litigation in West Virginia.

Simply stated, were a business able to determine in advance its exposure to punitive damages, it would pass along the predictable cost of those damages to the consumers and thus never suffer any real financial consequence when it engaged in severe misconduct. For that reason, courts and commentators have found that "uncertainty as to the possible amount imposed is essential." Comment, *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness,* 24 St. Mary's L.J. 197, 218 (1992). "[I]t is the relatively 'indeterminate' nature of punitive damages which makes them a valuable tool in discouraging the marketing of unsafe products, because the indeterminacy of punitive damages prevents manufacturers from being 'able to predict, within certain limits, how much punitive damages will be awarded and figure such a number into a cost/benefit analysis.'" *Germanio v. Goodyear Tire & Rubber Co.,* 732 F. Supp. 1297, 1302-03 (D.N.J. 1990), *citing Man v. Raymark Indus.,* 728 F. Supp. 1461, 1467 (D. Haw. 1989).

Throughout the arguments, the *amici* claim there must be some type of proportionate relationship, some greater linkage to compensatory damages so that those subjected to punitive damages can "plan ahead." While states are free to establish a ratio using compensatory damages, there are compelling policy reasons for this Court to avoid imposing this result.

- First, such a decision would leave unpunished wealthy actors who engage in grotesque misconduct that requires dramatic sanction where there is only a nominal compensatory damage.

- Second, there are situations when compensatory awards are massive and a fixed ratio would work an injustice against the defendant.

- Third, the basic goals of punitive damages--deterrence, retribution, and punishment gauged by the nature of wrongfulness--have nothing to do with a plaintiff's injury; these critical factors are all tied into the defendant's behavior.

- Fourth, particularly for business torts, the profitability of egregious and deceitful misconduct is that which must be deterred; linking punitive damage awards to actual compensatory loss would eliminate the ability of a court to engage in such deterrence.

- Fifth, the discretion of the jury can be best exercised when it is free to raise punitive damages for a wealthy defendant or lower them for a less affluent party in carrying out the punishment and deterrent function.

- Sixth, this Court has made clear that the relationship that needed to be evaluated most closely was that which existed between the punitive damages and the defendant's conduct, not necessarily gauged by the compensatory losses the plaintiff sustained. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991).

A decision that compels the states to establish fixed ratios would have a disastrous effect on the deterrent value of punitive damages.

> Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 St. Mary's L.J. 797, 833 (1987). Generally, courts favor an individualized punitive damage system not bound by mathematical equations.

> The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish and . . . the amount which must be awarded. . . .

Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (2d Cir. 1981).[1] Some courts have struggled to find a proper calculation mechanism[2] but have come up empty-handed:

[1]*See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1180-81 n.9 (1931) (rejecting proportional ratios as "arbitrary").

[2]*Linsley v. Bushnell*, 15 Conn. 225, 235 (1842) ("there is no rule of damages fixed by law" to accommodate punitive damages); *Commodore Corp. v. Bailey*, 393 So. 2d 467, 472 (Miss. 1981) ("The amount [of punitive damages] cannot be determined by any fixed rule.").

> Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.
>
> Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault, Inc., 202 Cal. Rptr. 204, 209 (Ct. App. 1984).

This Court has suggested that a plaintiff's entitlement to the "recovery of uncertain damages" is not flawed constitutionally, though defendants are entitled to certainty in ascertaining what conduct is wrong.[3] *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987). *Tull* follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286 (1911).

A directive to impose fixed multiples or other

[3]A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, *Punitive Damages: An Appeal for Deterrence*, 61 Neb. L. Rev. 651, 676 (1982).

means of ensuring certainty would frustrate legitimate and reasonable state consumer protection objectives and interfere unduly with an area of law vested clearly to the states.

B. The Admissibility of Evidence Describing the Wealth of the Defendant Furthers Legitimate State Objectives

TXO contends it is inappropriate to admit information regarding the wealth of the defendant in a punitive damage case. In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 (5th Cir. 1991), the court determined that a punitive damage award could be "ineffectual and impotent" if made without knowledge of corporate size or wealth. The North Dakota Supreme Court has taken the same position: "Evidence of a defendant's wealth or lack of wealth may properly be considered by the jury when fixing punitive damages because the defendant's financial condition will necessarily have a bearing on the amount that will serve as a meaningful punishment of the defendant." *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989).

West Virginia follows the *Eichenseer* position and deems wealth data important to allow the jury to assess damages accurately for determining punishment and deterrence. In *Slack v. Kanawha County Housing & Redevelopment Auth.*, 423 S.E.2d 547 (W. Va. 1992), the West Virginia Supreme Court of Appeals reaffirmed the virtue of permitting wealth information, though cautioned that such evidence was not absolutely necessary. *See Hess v. Marinari*, 94 S.E. 968 (W. Va. 1918).

These cases recognize that a punitive damage award, in stark contrast to compensatory damages, must focus on the economic environment in which the defendant finds itself. This task obligates a jury to see the damages as part of a much larger picture involving the desire of a defendant to acquire wealth through gross misconduct, the financial posture of the defendant, and the need to deter the defendant and others like it from engaging in similar conduct. Although the median punitive damage award is $8,800 (see *infra* Part IV), in isolated cases the amount of money required to punish a vast corporate enterprise may be substantial and potentially dissonant with the economic situation of the plaintiff.

The jury judgment in this area regarding the size of punitive damages is one of the most difficult things we ask jurors to do; it is thus counterproductive to ask them to undertake that task and then deprive them of basic information they will need to make an informed and effective decision. *See Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1277 (D.C.V.I. 1974). More than a half-century ago, Clarence Morris made clear the necessity of considering wealth in punitive damage cases on the grounds that a "penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is, the larger the punitive damage award should be." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

Although a state's choice to permit wealth information seems a simple matter, it is not surprising that large punitive damage awards create controversy and concern among the public and periodically the judiciary since such awards must correspond to the defendant's fiscal status, not the plaintiff's. In a punitive damage case, particularly one involving an economic tort, the defendant is often a substantial economic actor who will not be influenced and whose market counterparts will not be deterred unless the award bears a relationship to the defen-

dant's economic capacity. *See, e.g., McArthur v. Bockman*, 256 Cal. Rptr. 522, 525 (Ct. App. 1989).

The substantive due process claims in this case include the claim that the maintenance of "uncertainty" and the admissibility of wealth data caused petitioner harm and do not further a rational state purpose. In fact, there are powerful, reasonable, and clearly articulated reasons for state endorsement of these policies.

II

RESPECT FOR DECISIONS OF A PROPERLY INSTRUCTED JURY IS AT THE CORE OF OUR SYSTEM OF JUSTICE AND FUNDAMENTAL TO DUE PROCESS. JURY DETERMINATIONS MUST BE AFFORDED SUBSTANTIAL DEFERENCE.

The presupposition underlying the petitioner's claim in this case, and more broadly the claims of the *amici* is that jury decisions in the punitive damages area are suspect. This Court must resist this attack. Juries are asked to make decisions of great magnitude and complexity on matters affecting life, liberty, and property. Their decisions are the fair voice of the community. That is not to say, however, that theirs is a simple task, particularly when it comes to punitive damages; it is, however, an essential task.

A. Juries Must Make Careful But Difficult Decisions on the Nature of Wrongfu ness in Every Punitive Damage Case

Although the petitioner and the respondents disagree on much, there is little disagreement regarding the necessity of the jury considering "nature of the wrongfulness" of the defendant's misconduct in determining the

amount of punitive damages. Evaluating wrongfulness is so fundamental to the law of punitive damages that it has not been challenged in any of the cases before this Court; nevertheless, this single factor plays a greater role in the magnitude of a punitive damage award than any other.

In effect, juries are asked to use their discretion in determining the level of the defendant's reprehensibility. Juries must formulate a continuum which has at its low end "gross negligence" and at its high end "intentional and vicious misconduct." In each punitive damage case, juries are asked to rate behavior on an unseen scale and then use that rating as an aid to determining damages.

Making determinations regarding deterrence or punishment, in contrast to determinations regarding wrongfulness, is more straightforward. Given knowledge of the wealth of the defendant, a jury can determine how much money it will take to sanction. With an understanding of the profitability of misconduct, a factor of consequence to the *TXO* jury, a jury can determine what it will take to dissuade others from engaging in the same type of misconduct. In the field of law and economics, attaching a dollar value or quantifying the sum required to deter misconduct is central to much of the literature. Charles J. Goetz, *Cases and Materials on Law and Economics* (1984); Richard A. Posner, *Economic Analysis of the Law* (4th ed. 1992). Law and economics literature fails us, however, when looking at the nature of wrongfulness.

The dollar value of wrongfulness is a matter of personal judgment, moral consideration, and ethical beliefs. It is precisely because the nature of wrongfulness is so much a judgment of the individual, and a reflection of community values, that the discretion of the jury must be respected. Similarly, it is for this reason that articulating a precise calculus for determining punitive damages is

both destructive to the jury system and incompatible with the law.

> Reasonable men and women will differ in determining the amount of exemplary damages, but so long as the jury's decision is based on competent evidence, is free of passion or prejudice, and is appropriately reviewed by the trial judge, [there is] no basis for substituting this court's opinion in the place of the jury's.

Hansen v. American Nat'l Bank, No. 91-SC-375-DG, 1992 Ky. LEXIS 187, 21 (Dec. 17, 1992).

In this area of wrongfulness, juries must engage in the difficult but essential task of determining the relationship between "the degree of malice proved and the punitive damage award." *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. Ct. App. 1991). This is the respected and historical function of a state court jury and, "absent an abuse of discretion, an appellate court is not justified in interfering with the assessment." *Holcroft v. Missouri K.T.R. Co.*, 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). The jury judgment in this area and specifically the judgment of the *TXO* jury, must be protected unless it appears to be "out of all proper proportion" or based on "improper motives." *Id.* at 164.

In most punitive damage cases, juries are told to look beyond "the underlying tort" and focus on the "defendant's conduct and motives." *Herman v. Sunshine Chem. Specialities, Inc.*, 608 A.2d 978, 981 (N.J. Super. Ct. App. Div. 1992); W. Page Keeton et al, *Prosser and Keeton on the Law of Torts*, §2 at 11 (5th ed. 1984). It would be perverse and inconsistent with our entire system of jurisprudence were we to suddenly determine that a jury is incapable of undertaking this task. We trust juries to guard against the misuse of power and to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L.J. 797, 824 (1987). "It would be ironic indeed for the Supreme Court to hold that the jury's wisdom, so often favored when it decides to take someone's life, becomes offensive to due process when it takes someone's money." Comment, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 183 (1991). The underlying reason for empowering the jury in this area is obvious:

> [T]he jury is in the best possible position to function as the communities' conscience. A jury's reactions of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of the award, it measures societies' outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

Borowsky & Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 152-53 (1983) (footnotes omitted).

B. The Jury in This Case Received Clear and Proper Instructions Conforming with Due Process Requirements and with This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip*

Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991), evaluated procedures in Alabama to determine whether there was "a sufficiently definite and meaningful restraint on discretion of Alabama factfinders in awarding punitive damages" while reaffirming the proposition that punitive damage jurisprudence is grounded in state tort law. *Silkwood v. Kerr McGee Corp.,* 464 U.S. 238, 255 (1984). *Haslip* cautioned states to ensure that juries are given meaningful instructions and that post-trial and appellate review occur. *Haslip* did not, however, direct the states to articulate new standards.

There are situations where critical constitutional interests are at stake, and states are directed to articulate guidelines to protect the fundamental interests of the citizenry. For example, after *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), this Court directed the states to articulate standards in defamation cases involving private persons and media defendants with the liability standard ranging between negligence and malice, eliminating strict liability. Nowhere in the *Haslip* opinion is there a directive to the states to articulate precise standards in the punitive damage area, nor can the language of *Haslip* be read as obligating state courts to move in a "new direction" regarding punitive damages. *Hoff v. Bauer,* 492 N.W.2d 912, 914 (S.D. 1992).

The constitutional review undertaken in *Haslip* inquired whether there are objective criteria guiding a jury, a fair process by which a jury decision can be reassessed at the trial court level, and an appellate review based on

meaningful criteria in terms of the goals of punitive damages. *Haslip* requires that such damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. . . ." 111 S. Ct. at 1045. The process used in the state of West Virginia in determining the liability of the TXO Production Corporation conformed fully with these requirements, and the damages, reflecting an amount less than the profit potential of the petitioner, were rational in light of their purpose.

The instructions given to the jury in *TXO* are standard, thorough punitive damage instructions substantially similar to those in *Haslip*. Instruction No. 6A instructed the jury on the culpability and the amount of damages. As to culpability, the jury had to find behavior that was "wanton, willful, malicious or reckless conduct which shows an indifference to the right of others. . . ." Joint Appendix at 34. As to the critical question of amounts, the jury was told to

> take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore, the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Joint Appendix at 34-35.

As in *Haslip*, an option was provided whether to award punitive damages, the goals of punishment and deterrence were clearly articulated, and the jury was directed to engage in the difficult task of assessing the nature of the wrongfulness of the defendant's behavior.

The second fundamental requirement of *Haslip* was a post-trial review. An oral argument on September 20, 1990, before the trial court judge permitted argument for both sides on post-trial motions, including a request for a remittitur. At the conclusion of that proceeding, the trial court judge acted on the motions and denied the request for remittitur, concluding an adequate post-trial review. Petitioner's Appendix in the Petition for Certiorari at 55A-74A.

The final obligatory proceeding, based on *Haslip*, was the appellate review in the Supreme Court of Appeals of West Virginia. The court determined the defendant had engaged in "intentionally committed, mean spirited, and harmful acts." *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992). It found the behavior of TXO was fraudulent, intentional, and capable of causing "millions of dollars in damages to other victims." *Id.* The court found the award of $10 million was "necessary to discourage TXO from continuing its pattern and practice of fraud, trickery, and deceit." *Id.* at 889-90.

Petitioner and its *amici* attack the *TXO* opinion because, in addition to the above review, the court chose to create a rather awkward dichotomy between "really mean" and "really stupid" acts of misconduct. While lawyers and law professors might choose to make light of the

grammatical or linguistic frailties of this section of the opinion, faulty grammar or poor word choice do not render this opinion flawed, nor this process unconstitutional. Given the necessity of demystifying legal jargon and rediscovering "plain English," particularly in jury instructions, one should not be so quick to condemn recommending understandable terms like "mean" (conveying intention) and "stupid" (conveying gross negligence). The phrases used by the trial court judge or the language used in the court of appeals could have been articulated with greater clarity. The Due Process Clause, however, does not mandate rhetorical perfection, but rather notice and an opportunity to be heard.

C. The *TXO* Jury Benefited From Clear Instructions and Did Not Function in a "Vague and Standardless" Setting

The petitioner contends the instructions in this case were vague and thus constitutionally deficient. Since the instructions to the jury in this case were substantially similar and even more confining than those in *Haslip,* and since there was adequate post-trial and appellate review, it is hard to say that there is a systemic flaw in West Virginia procedure. On the question of vagueness, the petitioner has followed up on the "void for vagueness" concerns raised in the dissenting opinion in the *Haslip* case.

As a general rule, the constitutional prohibition on vagueness is utilized "for curbing legislative invasion of constitutional rights other than that of fair notice," not for second-guessing jury instructions. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 87-88 (1960). Although vagueness concerns have been raised in punitive damage cases, there is little basis for the applicability of the doctrine beyond civil or

criminal statutory analysis. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1535-36 (D. Minn. 1989). The vagueness concerns in this field relate to communicating with potential defendants that which is prohibited so that behavior can conform with the law in a particular state. Accordingly, most challenges to the damage calculation mission, historically vested to the discretion of a well instructed jury, have not gone forward under the statutory tests that are inherent in a "void for vagueness" dialogue. *Coyne v. Allstate Ins.*, 771 F. Supp. 673, 679 (E.D. Pa. 1991); *cf. Williams Pipeline v. City of Mounds View*, 704 F. Supp. 914, 921 (D. Minn. 1989).[4]

The trial judge in the present case gave instructions on punishment, deterrence, and wrongfulness, enunciated the purpose of punitive damages, and explained the level of culpability needed. Nothing more is needed. The standards are clear, and the jury was properly instructed. To contend that this is a "standardless" process flawed by vagueness or that the judge failed to communicate state law is to deny fact.

[4]West Virginia punitive damage law is substantially similar to that of Hawaii. A constitutional challenge there was resolved thusly: "[T]he standard established by Hawaii law is sufficient to apprise potential defendants and juries of both the nature of the conduct which may expose one to punitive damage liability as well as what level of award is appropriate under the circumstances." *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Haw. 1989).

III

WEST VIRGINIA PUNITIVE DAMAGE LAW COMPORTS WITH DUE PROCESS.

A. The History of Substantive Due Process Mandates Restraint in Assessing State Law Programs or Jury Verdicts

Probing substantive due process review is reserved for constitutional assessments of fundamental entitlements. A system that allows punitive damage awards affecting property interests need satisfy only the rational basis test.[5]

In situations involving interests of an entirely different character than those involved in this case, an expansive review is mandated. Intrusive review may be needed when assessing "statutes directed at particular religious, or national, or racial minorities . . . [or laws] which . . . seriously . . . curtail the operation of those political

[5]*Lochner v. New York*, 198 U.S. 45 (1905), one of the "most ill-starred decisions that [the Court] ever rendered," declared unconstitutional a New York workplace safety law. William H. Rehnquist, *The Supreme Court--How It Was, How It Is* 205 (1987). The Court balanced public safety and freedom of contract and, coming to a result opposite that of New York lawmakers, used substantive due process to assert their will. For the next thirty years the Court used substantive due process "to strike down state laws, regulatory of business and industrial conditions, because they . . . [were thought to] be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). *Lochner* "wisdom substitution" subsided with *Nebbia v. New York*, which held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare." 291 U.S. 502, 537 (1934). To expand *Lochner* substantive intrusion to review of the size of a jury verdict is a true reversion to a negative past.

processes ordinarily to be relied upon to protect minorities. . . ." *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938) (citations omitted). These cases employ a careful review of the purpose and precision (or vagueness) of state law on fundamental constitutional entitlements or interests, none of which bear the slightest resemblance to the interests asserted by petitioner in this case.[6]

The negative consequences of an overexpansive view of substantive due process illuminate two canons of constitutional interpretation. Rehnquist, *The Supreme Court,* at 144. The first requires restraint in the use of the Constitution to resolve a matter addressed appropriately by other standards. *Id.* West Virginia has addressed the matter of punitive damages through recent judicial action, as have numerous states. The second holds that a mere sense of unfairness is not a basis to declare a law unconstitutional. "[A] sense that a law is unfair, however deeply felt, ought not to be itself a ground for declaring an act of Congress void." *Id.* at 145.

> Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at

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[6]*See, e.g., Roe v. Wade,* 410 U.S. 113 (1973) (involving abortion); *Boddie v. Connecticut,* 401 U.S. 371 (1971), and *Loving v. Virginia,* 388 U.S. 1 (1967) (involving freedom of choice in marital decisions); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (involving marital privacy); *Carey v. Population Services Int'l,* 431 U.S. 678 (1977) (purchase of contraceptives); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. Nebraska,* 262 U.S. 390 (1923) (involving child rearing).

> fashioning a solution.

Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 700 (1976).

The request for a substantive due process review of West Virginia law on the premise that this verdict is "wrong" is not based on any solid constitutional ground. Since the state law and the processes that implement the law support multiple legitimate state interests, the requirements of due process are satisfied.[7] Even if the constitutional challenge was based on "vagueness" and one were to assume that there were constitutionally suspect vagaries in the state, *Garnes v. Fleming Landfill, Inc.,* 413 S.E.2d 897 (W. Va. 1991), resolves any question of the specificity of the law of West Virginia for the future.[8]

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[7]Protecting consumers through the implementation of a vigorous punitive damage system that maintains a balance between punishment and deterrence and that requires the sum awarded to match the level of reprehensibility of the defendant constitutes a clear, reasonable state objective.

[8]Initially, the petitioners contended that the court's failure to apply retroactively the punitive damage language articulated in *Garnes* required that the verdict be set aside. Although this Court has recently considered the matter of retroactive application of standards, *see, e.g., James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439 (1991), the question of whether a state is obligated to apply retroactively procedural refinements hardly seems controversial. Retroactive application of decisions such as one affecting a linguistic elaboration of recommended jury instructions or review standards is so soundly vested to the discretion of the state as to be beyond question. *Great Northern Ry. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). Since *Garnes* neither raised a new principle of law nor overruled past precedent on which the parties may have relied, its nonapplicability did not flaw the *TXO* opinion. *See Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971); *but see American Trucking Assn. v. Smith,* 496 U.S. 167 (1990), and for West Virginia *see Devmja v. West Virginia Bd. of Medicine,* 408

By virtue of *Garnes*, West Virginia has moved far beyond the norm in terms of clarifying the standards for punitive damages. Accordingly, there is no need for this Court to embark on the extremely controversial task of rewriting state jury instructions or standards for trial court or appellate review; this task has already occurred in the proper forum. Since *Garnes* is the law of the state for punitive damage trials to be held in the future, this Court is left with the singular task of deciding whether its judgment regarding the size of the verdict in the *TXO* case would be different than the judgment of the jury that sat in the *TXO* case. Such second-guessing of state court juries on purely factual questions hardly seems appropriate.

B. West Virginia Trial Process Comports with Procedural Due Process

A true failure of process is a most serious constitutional matter. Were the petitioner denied notice of a legal standard, the possibility of sanctions, or were there a denial of an opportunity to be heard, this Court would be obligated to act. No such facts exist to support those contentions. This case does not involve a denial of an opportunity to be heard or notice, but rather a disagreement over the wisdom of substantive choices made by state law and by a jury. Such is hardly an appropriate matter for a due process review.

Deciding what processes are due requires a balancing of interests articulated in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *Mathews* established a three-part test for balancing various interests when the state action affects life, liberty, or property requiring an assessment of

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S.E.2d 346 (W. Va. 1991); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

the private interests and government interests affected, as well as the risk of error in the process.

Petitioner claims that it was entitled to "better" jury instructions, including limits on liability, to more oral clarity from the judge who gave the jury instructions, to a more artful state Supreme Court of Appeals decision, and to a "better" set of laws regarding punitive damages. These matters may be of great consequence, but they are not part of a procedural due process analysis. They are substantive law issues vested to the best judgment of the state of West Virginia. A North Dakota court assessed similar claims as follows:

> Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty, or property. This procedural aspect of the due process clause does not protect against the use of arbitrary rules of law which are the basis of those proceedings.

Puppe v. A.C. and S., Inc., 733 F. Supp. 1355, 1360 (D.N.D. 1990) (footnotes omitted).

As previously noted, the methodology for determining process entitlements requires an assessment of petitioner's private interests, in this case money. Specifically, petitioner would like greater certainty and predictability regarding the potential of a large punitive damage award. Such information would allow petitioner to modify its pricing of goods and services and ensure against the "sting" of a punitive damage award. As already demonstrated, a component of uncertainty forwards the rational state interest in the punishment function of punitive damages and does not compel a constitutional inquiry.

Petitioner's interest in certainty regarding disposition of its property runs in tandem with the allegation that the West Virginia jury system presents a dangerously high risk of erroneous decisionmaking, the second leg of the *Mathews* test. The interest claimed here is equally vacant. The jury heard all of the evidence at trial, including the petitioner's defenses. They were instructed that they did not have to award punitive damages, but if they did, the amount should reflect what is necessary to punish and deter, taking into account the wrongfulness of the conduct. The foregoing process is constitutionally sufficient.

The final leg of a *Mathews* analysis requires an assessment of the governmental interest in the challenged process. In this case a procedural due process attack has been levied against the use of a jury. The state has a significant interest in maintaining a punitive damage system that allows juries to express the will of the state to punish intentional wrongdoers and deter future destructive behavior. These are powerful interests in comparison with the private interest of the defendant. In light of these interests, it is hard to conceive of a reasoned analysis that would compel this Court to rewrite the laws of West Virginia based on a failure of procedural due process.

IV

THERE IS NO TORT CRISIS JUSTIFYING INTERVENTION BY THE SUPREME COURT.

During the last ten years the tort system--and particularly the various systems for determining punitive damages--has come under close scrutiny. In the present case, this Court has agreed to consider whether the system for determining a $10 million punitive damage award in West Virginia comports with the constitutional requirement of due process. It appears a motivation to consider this matter comes from a concern that punitive damages nationally are "out of control," depriving parties of fundamental fairness. *Pacific Mutual Life Ins. Co. v. Haslip,* 111 S. Ct. 1032, 1039 (1991), *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part), and *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 87-88 (1989) (O'Connor, J., concurring).

A recent comprehensive study funded by the American Bar Foundation concludes that there is no punitive damage crisis based on a careful evaluation of 25,000 jury verdicts and related statistics. Daniels & Martin, *Myth and Reality in Punitive Damages,* 75 Minn. L. Rev. 1 (1990), and Daniels & Martin, *Myth and Reality in Punitive Damages,* ABF Working Paper No. 8911 Am. B. Found. Res. J. 63 (1990) ["ABF Study"]. Although the *amici* in this case assert to the contrary, there is no clear and unequivocal data suggesting a national crisis sufficient to compel intrusive judicial intervention, stretching the limits of the due process clause, to address a problem that may well not exist.[9]

Critics of punitive damage awards distort statistical images through the use of numerical averages. For exam ple, in a RAND study, the average award was $137,350, but 87.7 percent of the cases had awards lower than the average, with a median of $8,800. Peterson, *Punitive Dam-*

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[9]A diverse group of scholars have written that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, *New Light on Punitive Damages,* 10 Reg. 33 (Sept./Oct. 1986); Burrow & Collins, *Insurance Crisis–Texas Style: The Case for Insurance Reform,* 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform,* 18 St. Mary's L.J. 673, 695 (1987).

ages: Preliminary Findings (RAND Institute for Civil Justice 1985). The fact is that "[t]he predicted unmanageability of punitive damages has failed to materialize. Experience has shown that judicial oversight of punitive damages awards has greatly reduced the risk of substantial over-deterrence." Reisberg, *In Defense of Punitive Damages*, 55 N.Y.U. L. Rev. 303, 345 (1980). There are three juried empirical and systematic studies of punitive damages, and none support the proposition that there is a national crisis in punitive damages.[10] This Court must avoid scrupulously the mischaracterizations that have been put forward regarding the state of punitive damages:

> Horror stories and their implications are presented as if they are representative of what is typical, describing a system run amuck and in need of fundamental and immediate change. Such vivid stories typically distort the actual facts of situations described. . . . The stories are meant to foster the acceptance of a particular characterization of the civil justice system and punitive damages. . . . The view is portrayal as one so obvious and common-sensical that no reasonable person could disagree. . . .

ABF Study at 22. In the absence of unequivocal data suggesting a crisis in the punitive damage area, judicial intervention into an area vested historically to the states is unwarranted.

[10]Rustad, *Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter-Century of Trial Verdicts*, 1991 Roscoe Pound Foundation, Research Monograph; the ABF Study; and Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings* (RAND Institute for Civil Justice 1987); Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 Rev. Litig. 113, 123 (1988) ("The attack on punitive damages is part of a wide-ranging, well organized attack on the current tort system. . . . There is substantial evidence that the claims of runaway punitive damages are greatly exaggerated.").

In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated. Constitutionality of punitive damages was considered in *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law."

Punitive damages are vital to the protection of consumers. With the minimum of transaction costs, they achieve the dual goals of punishment and industrywide deterrence of future misconduct and creation of incentives to upgrade the quality of goods and services.

In the state of New York, the deterrence function of punitive damages is well recognized:

> A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961).

Finally, it has been contended that punitive damages have an adverse effect on the competitive posture of the United States. *Browning-Ferris,* 492 U.S. at 282 (O'Connor, J., dissenting). Quite simply, there is no empirical basis to support the proposition.

It seems incredulous to assert that a system that condemns products or services produced fraudulently, in a grossly negligent manner, or in a way that comports with intentional misconduct is destructive of the competitive posture of the United States. In *Man v. Raymark Indus.,* 728 F. Supp. 1461 (D. Haw. 1989), the court considered whether punitive damages have a detrimental effect and prevent manufacturers from developing new products due to their fear of "uncertain liability."

> This court respectfully suggests that if that is indeed what is happening [to proposed new products], then punitive damages are accomplishing a worthy goal. In this respect it is important to remember that punitive damages are awarded for some form of outrageous misconduct, never for simple negligence. A manufacturer who vigilantly and honestly tests his product can have no fear of punitive damages.

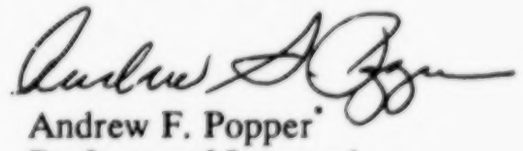
728 F. Supp. at 1467 n.7.

CONCLUSION

The state of West Virginia has complied with constitutional, common law, and statutory requirements in the *TXO* case. In so doing, it expressed policy that permits

punitive damages for reasons that are obvious: such damages forward efficiently the interests of the citizens of the state, punishing those who flout the law and discouraging those who might try. To interfere with the state through this forum is wrong. The decision of the state in *TXO* should be affirmed.

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